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Supreme Court, U.S.
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No. 03-1500

In the Supreme Court of the United States

THOMAS VAN ORDEN,
Petitioner,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Texas Capitol, including its surrounding twenty-two acres, was dedicated in 1888. *See* Pet. App., at 2. Three years later, the first monument was built on the grounds and dedicated to Texans who died at the Alamo. *See id.* Seventeen monuments now adorn the Capitol grounds, which is listed on the National Registry of Historic Places and designated a protected National Historic Landmark.[1] *See id.* at 3.

The State Preservation Board is charged with preserving, maintaining, and promoting the cultural resources of the Capitol and its grounds. The Board hires a professional curator, who is given the duties of cataloguing and preserving the contents of the Capitol buildings and grounds. *See* TEX. GOVT. CODE § 443.006.

Visitors to the Capitol may take a guided tour of the Capitol building, which contains historic statues, portraits, and other memorabilia, and they may take a self-guided tour of the outdoor displays. *See* Pet. App., at 3. The tour of the Capitol building includes numerous monuments, plaques, and seals portraying both the religious and secular history of Texas. *See id.* They include a tribute to African-American legislators, a Confederate plaque, a plaque commemorating the donors of granite for the building, and a plaque commemorating the war with Mexico. *See id.* A Six Flags Over Texas display on the floor of the Capitol rotunda

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1. The purpose of the National Historic Preservation Program is to preserve "for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States." 16 U.S.C. §461. "Only 3% of properties listed in the National Register of Historic Places are designated as National Historic Landmarks," and these places are considered "an irreplaceable legacy to [present] and future generations." NAT'L PARKS SERV., U.S. DEP'T INTERIOR, NATIONAL HISTORIC LANDMARKS PROGRAM, *at* http://www.cr.nps.gov/nhl/publications/bro2.htm (last visited July 1, 2004).

features the Mexican eagle and serpent—a religious symbol of Aztec prophecy[2]—as well as the Confederate seal inscribed with "Deo Vindice" (God will judge). *See id.* Visitors to the Supreme Court building would find "Sicut Patribus, Sit Deus Nobis" ("As God was to our fathers, may He also be to us") inscribed above the Justices' bench. *See id.*

In 1961, the Texas chapter of the Fraternal Order of Eagles donated a Ten Commandments monument "to the Youth and People of Texas" to be erected on the Capitol grounds. Tex. S. Con. Res. 16, 57th Leg., R.S., 1961 Tex. Gen. Laws 1195, 1195–96; Resp. Br. App., at 1a. In accepting the gift from the Eagles and granting permission to erect the monument, the Legislature officially "congratulated" the Eagles "for [their] efforts and contributions in combating juvenile delinquency throughout our nation." *Id.*, at 1a. Texas House Representatives Wil Smith and Senator Bruce Reagan dedicated the monument. *See* Pet. App., at 4. No evidence exists to suggest that the dedication ceremony included any religious references, nor is there evidence that any clergy participated in the ceremony. *See id.*, at 5, 11.

The Ten Commandments monument sits between the Supreme Court building and the Capitol. Six other monuments fall in the same vicinity: a tribute to the children of Texas, a statue of a pioneer woman holding a child in tribute to the role of women in Texas history, a replica of the statue of liberty in tribute to the Boy Scouts of America, a tribute to Korean War veterans, a tribute to veterans of World War I, and a monument to the Texans who died

2. In the center of the Mexican flag lies a brown eagle with a snake in its beak, perched on a cactus growing from a rock surrounded by water. The depiction derives from Aztec mythology, regarding the site for the foundation of their theocratic capital at Tenochtitlán, which is now Mexico City. Pet. App, at 3. This religious display is neither Jewish nor Christian, but native to Texas long before the arrival of those faiths.

at Pearl Harbor. *See* 1R 323. These monuments, along with the rest of the seventeen monuments on the Capitol grounds, constitute "statutes, memorials, and commemorations of people, ideals, and events that compose Texan identity." H. Con. Res. 38, 77th Leg., R.S. (2001).

The petition accurately describes the physical characteristics of the monument. The Building and Engineering Management Division of the State Board of Control decided that the monument should be erected on the south Capitol grounds between the Capitol and the Supreme Court Building. *See* Pet. App., at 4, 15. In its original orientation, the monument faced the back, or North, door of the Capitol, so that a person looking toward the Northwest from that door might see the monument. The text of the monument, however, would not have been legible from that vantage point, because of its size and distance from the building. 1R 323. The monument requires virtually no maintenance. Pet. App., at 4.

In 1990, during the Capitol restoration project, the Ten Commandments monument was removed from its customary location and stored for its protection. 1R 323. After the completion of the project, the monument was returned to its original location, except that, at the direction of the Curator, it was oriented toward the southwest instead of toward the southeast, so that it would face the newly-created sidewalk. Pet. App., at 15. A practical result of the change in the monument's orientation is that its text is visible only to persons approaching the monument from the direction of the least-used, west entrance of the Capitol. 1R 333.

Some monuments that were present on the Capitol grounds before the restoration project were not replaced after the project's completion. *See* Master Plan, Historic Grounds of the Texas Capitol, at 51-53. The object of the restoration was to restore the most important portions of the Capitol's Historic Grounds (the Great Walk and the Oval Walk Precincts) to their condition as of

1915. *See id.*, at 51-53. Displays built in those areas after 1915 were either removed or moved to other locations on the Capitol grounds. *Id.*, at 51. Monuments, such as the Ten Commandments display, located on the Historic Grounds but not within the Great Walk and Oval Walk Precincts were retained only if they had been erected within 50 years of the restoration period, *i.e.* by 1965. *See id.*, at 53. Examples of monuments that were not returned to the Capitol grounds after the restoration project are the Austin Lawyers' Wives' Star and the Realtors' Centennial Monument, both of which were established after 1965. *See* Transcript, at 114.

SUMMARY OF ARGUMENT

Last Term, the State of Texas, as *amicus curiae* in *Russ v. Adland*, No. 02-1241, urged the Court to grant Kentucky's petition for certiorari and determine the constitutionality of a public display of the Ten Commandments. For many decades, Texas urged, state and local governments have chosen to acknowledge and memorialize the historical and cultural contributions of the Ten Commandments to the development of western legal codes. At that time, the Sixth Circuit had struck down Kentucky's monument and, in so doing, had furthered the significant and growing split of authority among the courts of appeals and state courts regarding the constitutionality of government displays of the Ten Commandments. As our *amicus* brief explained, the split was "clear, wide, and deep." Not only had the courts come to opposite constitutional conclusions regarding virtually identical displays, but they had also differed starkly in their analysis of almost every aspect of the test laid out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

Now, one year later, in the role of Respondent defending its own display of the Ten Commandments—having prevailed in the court below—Texas again asks the Court to decide this important question. Since last Term, the split of authority regarding the

constitutionality of government displays of the Ten Commandments has only deepened and widened. Moreover, the near constant stream of litigation regarding Ten Commandments displays demonstrates the unabating importance of this issue. Accordingly, the State acquiesces in certiorari.

Due to the particular context of the Texas monument, this case provides the Court an appropriate opportunity to resolve the growing conflict among the lower courts and to reaffirm that government may permissibly recognize the role of religion as a foundational aspect of our nation's law and culture. This case was tried on a stipulated record, is free of vehicle problems, concerns an Eagles monument virtually identical to those struck down in other circuits, and presents the facts and circumstances most favorable to upholding the display of the Ten Commandments. The Court should grant certiorari and affirm the judgment of the court below.

ARGUMENT

I. THERE IS A SIGNIFICANT SPLIT AMONG THE COURTS OF APPEALS AS TO WHETHER TEN COMMANDMENTS DISPLAYS VIOLATE THE ESTABLISHMENT CLAUSE.

Last Term, Texas pointed out the pronounced split among the courts of appeals regarding the constitutionality of Ten Commandments monuments. *See generally* Br. of Amicus Curiae the State of Texas *et al.* in *Russ v. Adland*, No. 02-1241, at 6-12. At that time, the Sixth and Seventh Circuits had held that such monuments violated the Establishment Clause. *See Adland v. Russ*, 307 F.3d 471 (CA6 2002), *cert. denied*, 538 U.S. 99 (2003); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (CA7 2001), *cert. denied*, 534 U.S. 1162 (2002); *Books v. City of Elkhart*, 235 F.3d 292 (CA7 2000), *cert. denied*, 532 U.S. 1058 (2001). On the other side of the split, the Tenth Circuit, joined by the Colorado Supreme Court, had held similar monuments constitutional. *See Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (CA10 1973);

Colorado v. Freedom From Religion Found., 898 P.2d 1013 (Colo. 1995).

In the past year, the split has deepened to include decisions by two other courts of appeals. The Third and Fifth Circuits have now aligned with the Tenth in upholding displays of the Ten Commandments. *See Freethought Soc'y of Greater Pa. v. Chester County*, 334 F.3d 247 (CA3 2003); *Van Orden v. Perry*, 351 F.3d 173 (CA5 2003).[3]

The split among the courts of appeals could hardly be more stark, given that the monument in *Van Orden* is *virtually identical* to those in *Adland*, *Books*, *Anderson*, and *Colorado*—all were donated by the Fraternal Order of Eagles during the 1950s and 1960s. All have essentially the same dimensions, the same text, and the same symbols on their face. And yet, in the Sixth and Seventh Circuits, the Eagles monuments are unconstitutional, while in the Tenth and Fifth (and Colorado Supreme Court),[4] those very same monuments are not.

Moreover, these varying constitutional results regarding virtually identical monuments were reached after ostensibly applying the very same legal framework—the test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

By its terms, the first two prongs of the *Lemon* test ask (1) whether the challenged state action has a secular purpose, and (2)

3. The Eighth Circuit had joined the Sixth and Seventh Circuits in striking down a Ten Commandments monument. *See American Civ. Liberties Union Nebraska Found. v. City of Plattsmouth*, 358 F.3d 1020 (CA8 2004). However, on April 6, 2004, after the petition for certiorari was filed in this case, the Eighth Circuit vacated the panel's opinion in *Plattsmouth* and granted the city's petition for rehearing *en banc*.

4. Moreover, as of this year, in the Third Circuit, a plaque containing the Ten Commandments is likewise constitutional. *Freethought*, 334 F.3d, at 269.

whether the primary effect of the state action advances or inhibits religion. *Id.*, at 612. The Court has subsequently distilled *Lemon*'s first two prongs to mean that government may take no action that has the purpose or effect of endorsing or disapproving religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 600–01 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).[5]

One year ago, the courts of appeals disagreed on the application of virtually every facet of the *Lemon* test to these Ten Commandments monuments. As an initial matter, the courts of appeals diverged regarding the character of the text of the Ten Commandments itself. The Seventh Circuit found the Decalogue to be "inherently religious" text that cannot "be stripped of [its] religious, indeed sacred, significance and characterized as a moral or ethical document." *Books*, 235 F.3d, at 302. This conflicts with the Tenth Circuit's view of the Ten Commandments as "at once religious and secular" and as having "substantial secular attributes," *Anderson*, 475 F.2d, at 33, and with the Colorado Supreme Court's opinion that the Decalogue represents secular history and natural law, *Colorado*, 898 P.2d, at 1024.

5. Under this Court's precedents, a government display has the purpose of endorsing religion if it "convey[s] or attempt[s] to convey a message that religion or a particular religious belief is favored or preferred." *Allegheny*, 492 U.S., at 593; *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment). In determining whether a government display has the effect of endorsing religion, the question is "what viewers may fairly understand to be the purpose of the display." *Allegheny*, 492 U.S., at 595; *Lynch*, 465 U.S., at 692 (O'Connor, J., concurring). And that question is evaluated by the objective standard of the reasonable observer, deemed to be informed of the history and context of the display in question. *Allegheny*, 492 U.S., at 620; *id.*, at 631 (O'Connor, J., concurring in part and concurring in judgment); *Lynch*, 465 U.S., at 690 (O'Connor, J., concurring); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in judgment).

Now, the disagreements are even more pronounced. In *Van Orden*, the Fifth Circuit joined the Tenth, noting that the decalogue "is a sacred text to many [and] also a powerful teacher of ethics, of wise counsel urging a regimen of just governance among free people." 351 F.3d, at 182. Similarly, the Third Circuit has recognized that the Ten Commandments are regarded as having "an independent secular meaning in our society." *Freethought*, 334 F.3d, at 267.

The courts also disagree over the underlying purpose of erecting Ten Commandments monuments. *Anderson*[6] and *Colorado* both found ample secular purposes in erecting Eagles monuments, given the Ten Commandments' "substantial secular attributes," 475 F.2d, at 33, "expressions of universal standards of behavior common to all western societies," and "large role in the development of the common law and . . . national constitution," 898 P.2d, at 1024.

In contrast, the Sixth and Seventh Circuits relied principally on this Court's decision in *Stone v. Graham*, which concerned the constitutionality of mandating the posting of the Ten Commandments in the coercive context of public classrooms with schoolchildren subject to compulsory attendance. Both circuits read *Stone* as "compell[ing]" a rejection of the State's proffered secular purposes, *Adland*, 307 F.3d, at 481; *see also Books*, 235 F.3d, at 302-04.

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6. To be sure, the fact that *Anderson* was decided before *Stone v. Graham*, 449 U.S. 39 (1980), has provided a basis for a Tenth Circuit panel, in a footnote dictum, to question its reasoning. *See Summum v. Callaghan*, 130 F.3d 906, 913 n.8 (CA10 1997). But *Summum* did not overrule *Anderson*, *id.*, and neither did *Stone* (indeed, the *Stone* majority did not even mention *Anderson*, despite the dissent's reliance on the case, *see* 449 U.S. at 196 (Rehnquist, J., dissenting)). And *Anderson* was in a far different context—not in a potentially coercive schoolroom setting—than *Stone*, as the *Colorado* court compellingly reasoned. 898 P.2d, at 1022-23.

In the past year this conflict has widened, with the Third Circuit concluding that "*Stone* is fairly limited to its facts." *Freethought*, 334 F.3d at 262. The Fifth Circuit also joined *Anderson* and *Colorado* in recognizing the secular purposes behind displaying the Ten Commandments, including an acknowledgment of their "extraordinary" "influence upon the civil and criminal laws of this country" and upon "ethics and the ideal of a just society." *Van Orden*, 351 F.3d at 181.

The decision below and the decisions in *Freethought*, *Anderson*, and *Colorado* fundamentally conflict with the decisions in *Books*, *Adland*, and *O'Bannon*. The Court should grant certiorari to resolve this conflict.

II. Should the Court Wish to Decide This Important Question, The Instant Case Would Provide an Appropriate Vehicle to Affirm a Government Display of the Ten Commandments as Constitutional.

In view of the pronounced and growing split among the courts of appeals on government displays of the Ten Commandments, it appears likely that the Court will choose to grant certiorari on this important issue in the near future. If that is true, then this case could be a particularly suitable vehicle for that purpose. First, it was tried on a stipulated record. Thus, the facts are clear and undisputed. Second, no jurisdictional obstacles prevent resolution of the merits. *Cf. Adland*, 307 F.3d, at 490-94 (Batchelder, J., dissenting) (arguing that there the court lacked a justiciable case or controversy because the monument had not yet been erected.). Third, the case concerns an Eagles monument, virtually identical to those struck down in other circuits.

And fourth, and most importantly, this case presents the facts and circumstances most favorable to upholding the display of the Ten Commandments. The particular context in which this monument is placed—among numerous other monuments on the

grounds of the historic and museum-like Texas Capitol—could provide the Court with the opportunity to flesh out its 24-year-old statement in *Stone* that the Decalogue could, within the proper context, be displayed in a constitutional manner. *See Stone*, 449 U.S., at 42. Indeed, based on the historical setting of the Texas monument; the lack of any evidence of religious purpose; the surrounding monuments celebrating people, events, and ideals important to the culture and diversity of Texas; and the over four decades for which the monument has stood, the Court should affirm the Texas monument's presence as entirely consistent with the Establishment Clause.

The Texas monument falls within the permissible realm envisioned by *Stone* because of the monument's context and history. It has been located on the Texas Capitol grounds for over forty years, without the filing of any prior legal complaint. *See* Pet. App., at 16. There is no evidence of any religious references during the dedication ceremony or of any clergy participating; nor does any evidence even remotely demonstrate that Texas's proffered secular purpose is a sham. *See id.*, at 10.

As part of the Capitol—a national historic landmark and museum under federal law—the Ten Commandments monument is overseen by a professional curator and her staff. *See id.*, at 13. Following the Capitol restoration project—and ten years before this suit was brought—the museum staff chose to return the monument to its original location—on the direct line between the legislative chambers, the executive office of the Governor, and the Supreme Court building—to reflect the role of the Ten Commandments in the making of law. *See id.*, at 15. This fact supports both the State's secular purpose for erecting and retaining the monument as well as the conclusion that a reasonable viewer would not see this display as a state endorsement of the Decalogue's religious message. *See id.*, at 14-15.

All of these facts of circumstances, as the lower court held, collectively render the display constitutional under this Court's precedents. *See id.*, at 17. Instead, the overall context "supports the conclusion that a reasonable observer would not see this display either as a State endorsement of the Commandments' religious message or as excluding those who would not subscribe to its religious statements." *See id.*, at 14.

The Ten Commandments undoubtedly express religious and sacred admonitions; equally undoubtedly, the Ten Commandments have served an historic and secular role as a foundational text for Western culture and legal codes. Memorializing that secular role, of course, is the very building housing the Supreme Court of the United States; Justices of this Court need only look over their left shoulders from the bench to see Moses holding the Ten Commandments and looking down upon them.

In *Lynch*, the Court noted that "[o]ur history is replete with official references to the value and invocation of Divine guidance," including—explicitly—Moses holding the Ten Commandments on the frieze of the Court. 465 U.S., at 673-77. As Justice O'Connor explained, "because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." *Id.*, at 693 (O'Connor, J., concurring). They are consistent with the United States Constitution, as is the Ten Commandments monument in the State of Texas.

The decision of the court below is correct. If the Court elects to grant certiorari, it should affirm the judgment of the Fifth Circuit Court of Appeals.

CONCLUSION

The State of Texas acquiesces in certiorari. The Court should grant the petition for writ of certiorari and affirm the judgment of the court of appeals.

Respectfully submitted,

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July 2004

APPENDIX

SENATE CONCURRENT RESOLUTION NO. 16

WHEREAS, The Fraternal Order of the Eagles for the past several years have placed across the country, in courthouses, classrooms and public places, parchment plaques and granite monoliths of the Ten Commandments; and ———————

WHEREAS, These plaques and monoliths have been presented by the Eagles to promote youth morality and to help stop the alarming increase in delinquency; and ———————

WHEREAS, The Fraternal Order of the Eagles request permission to present a granite monolith to be placed on the grounds of the State Capitol of Texas; now, therefore, be it ——

RESOLVED, By the Senate of the State of Texas, the House of Representatives concurring, that the Fraternal Order of the Eagles of the State of Texas be commended and congratulated for its efforts and contributions in combating juvenile delinquency throughout our nation and be granted permission to have this granite monolith placed on the grounds of the State Capitol of Texas. ———————————————

/s/
President of the Senate

/s/
Speaker of the House

I hereby certify that S. C. R. No. 16 was adopted by the Senate on February 14, 1961. ———————————

/s/
Secretary of the Senate

I hereby certify that S. C. R. No. 16 was adopted by the House on February 22, 1961.

/s/
Chief Clerk of the House

Approved:

March 10, 1961

/s/
Governor

5:15 p.m.

/s/